

## Message Text

LIMITED OFFICIAL USE

PAGE 01 USUN N 01992 01 OF 02 221712Z POSS DUPE  
ACTION DLOS-09

INFO OCT-01 IO-13 ISO-00 FEA-01 ACDA-07 AGRE-00 AID-05  
CEA-01 CEQ-01 CG-00 CIAE-00 EPG-02 COME-00  
DODE-00 DOTE-00 EB-07 EPA-01 ERDA-05 FMC-01  
TRSE-00 H-01 INR-07 INT-05 JUSE-00 L-03 NSAE-00  
NSC-05 NSF-01 OES-07 OMB-01 PA-01 PM-04 PRS-01  
SP-02 SS-15 USIA-06 AF-10 ARA-10 EA-07 EUR-12  
NEA-10 /162 W

-----044371 230237Z /64

R 221605Z JUN 77  
FM USMISSION USUN NEW YORK  
TO SECSTATE WASHDC 4146

LIMITED OFFICIAL USE SECTION 1 OF 2 USUN 1992

FROM USDEL LOS

E.O. 11652: N/A  
TAGS: PLOS  
SUBJECT: INFORMAL PLENARY OF LOS (ARTICLE 12) OF JUNE 20, 1977

### SUMMARY:

THE DEBATE ON ARTICLE 12 (PROVISIONAL MEASURES) CENTERED ON SEVERAL ISSUES. THOSE IN FAVOR OF CIRCUMSCRIBING THE APPLICATION AND BINDING NATURE OF PROVISIONAL MEASURES SUPPORTED THE CHANGE IN 12(1) OF THE POWER OF THE COURT OR TRIBUNAL TO "INDICATE" RATHER THAN "PRESCRIBE" PROVISIONAL MEASURES, AND TO INCLUDE A FURTHER LIMITATION IN 12(1) THAT THE POWER OF THE COURT TRIBUNAL TO PRESCRIBE SUCH PROVISIONAL MEASURES COULD BE INVOKED ONLY IF IT ENJOYED PRIMA FACIE JURISDICTION. FURTHER RESTRICTION OF THE POWER TO PRESCRIBE WAS SUPPORTED BY MANY STATES BY PROPOSING THE INCLUSION OF THE REQUIREMENT OF "URGENCY" OR DANGER OF "IRREPARABLE HARM" BEFORE MEASURES COULD BE PRESCRIBED. THERE WERE ALSO A NUMBER OF DELEGATIONS WHO PROPOSED DELETION IN 12(1) OF THE PHRASE "OR TO LIMITED OFFICIAL USE

LIMITED OFFICIAL USE

PAGE 02 USUN N 01992 01 OF 02 221712Z POSS DUPE

PREVENT SERIOUS HARM TO THE MARINE ENVIRONMENT," WHILE OTHERS SPOKE IN FAVOR OF ITS RETENTION. THE MAJOR ISSUE ADDRESSED IN 12(3) WAS WHETHER OR NOT THE LOST SHOULD BE THE RESIDUAL FORUM UNDER 12(3), WITH MANY STATES OF THE BELIEF THAT ONLY A FORUM COMPETENT TO ADJUDICATE THE SUBJECT MATTER OF THE ISSUE (I.E., THE APPLICABLE FORUM UNDER ARTICLE 9) SHOULD BE EMPOWERED TO RENDER PROVISIONAL MEASURES. STATES

WHICH SPOKE INCLUDED CHILE, BAHRAIN, ISRAEL, KOREA, HONDURAS, TUNISIA, BRAZIL, THE UK, FRANCE, ECUADOR, THE USSR, THE USA, SWITZERLAND, SPAIN, CANADA, AUSTRALIA, BULGARIA, NORWAY, JAPAN, AND ARGENTINA. END SUMMARY

2. ARTICLE 12(1) - THE MAIN DEBATE ON 12(1) CENTERED ON WHETHER OR NOT THE COURT OR TRIBUNAL TO WHICH A DISPUTE IS SUBMITTED SHOULD HAVE THE POWER TO "PRESCRIBE" OR "INDICATE" PROVISIONAL MEASURES, WITH THOSE NOT FAVORING THE OBLIGATORY NATURE OF THE MEASURES OPTING FOR THE LATTER. IT WAS ARGUED BY BAHRAIN, ISRAEL, KOREA, TUNISIA, BRAZIL, FRANCE, AND ECUADOR, WHO FAVORED "INDICATE," AND MEXICO, THE U.S., NORWAY, AUSTRALIA, CANADA AND SWITZERLAND, WHO FAVORED "PRESCRIBE". REFERENCE WAS MADE TO ARTICLE 41 OF THE STATUTE OF THE ICJ IN WHICH THE COURT HAS THE POWER TO "INDICATE" ONLY. TO FURTHER DELIMIT THE SCOPE OF PROVISIONAL MEASURES, CHILE, SUPPORTED BY A NUMBER OF STATES, WISHED TO AMEND 12(1) SO THAT THE COURT OR TRIBUNAL WOULD HAVE THE POWER TO PRESCRIBE MEASURES ONLY IF IT HAD PRIMA FACIE JURISDICTION. THE CHAIRMAN (PRESIDENT AMERASINGHE) PROPOSED IN RESPONSE THERETO THAT THE FIRST THREE LINES OF 12(1) BE REPLACED BY THE FOLLOWING:

"IF A DISPUTE HAS BEEN DULY SUBMITTED TO ANY COURT OR TRIBUNAL WHICH CONSIDERS PRIMA FACIE THAT IT HAS JURISDICTION UNDER THIS PART, SUCH COURT OR TRIBUNAL SHALL HAVE LIMITED OFFICIAL USE

LIMITED OFFICIAL USE

PAGE 03 USUN N 01992 01 OF 02 221712Z POSS DUPE

THE POWER TO PRESCRIBE ANY PROVISIONAL MEASURES WHICH IT CONSIDERS APPROPRIATE UNDER THE CURCUMSTANCES."

THE PRESIDENT RECOMMENDED THE FOLLOWING CHANGE TO 12(3) TO MAKE IT CONSISTENT WITH HIS CHANGE TO 12(1):  
"IF A DISPUTE HAS BEEN SUBMITTED UNDER THIS SECTION TO A TRIBUNAL WHICH HAS NOT BEEN CONSTITUTED, ANY COURT OR TRIBUNAL AGREED UPON BY THE PARTIES OR, FAILING SUCH AGREEMENT WITHIN TWO WEEKS, THE LAW OF THE SEA TRIBUNAL, SHALL HAVE THE POWER TO PRESCRIBE PROVISIONAL MEASURES IN CONFORMITY WITH PARAGRAPHS 1 AND 2, IF IT CONSIDERS PRIMA FACIE THAT THE TRIBUNAL TO WHICH THE DISPUTE HAS BEEN SUBMITTED HAS JURISDICTION AND THAT THE URGENCY OF THE SITUATION SO REQUIRES. AS SOON AS IT HAS BEEN CONSTITUTED, THE TRIBUNAL TO WHICH THE DISPUTE HAS BEEN SUBMITTED MAY AFFIRM, MODIFY OR REVOKE SUCH PROVISIONAL MEASURES, ACTING IN CONFORMITY WITH PARAGRAPHS 1 AND 2."

HE ALSO PINTED OUT THAT THE TWO LIMITING FACTORS TO THE COURT'S POWER TO PRESCRIBE WERE: (A) THAT THE MEASURES COULD BE PRESCRIBED, MODIFIED OR REVOKED ONLY ON REQUEST

OF A PARTY UNDER 12(2); AND (B) THAT THE PARTIES ARE GIVEN AN OPPORTUNITY TO BE HEARD UNDER 12(2). CHILE, BAHRAIN, ARGENTINA, BRAZIL, TUNISIA, MEXICO AND ECUADOR WERE IN FAVOR OF THE RESTRICTION.

THERE WAS CONSIDERABLE SUPPORT FOR, ON THE ONE HAND, DELETION AND, ON THE OTHER HAND, THE RETENTION OF THE CLAUSE IN 12(1) "OR TO PREVENT SERIOUS HARM TO THE MARINE ENVIRONMENT, PENDING FINAL ADJUDICATION." BRAZIL, ISRAEL AND FRANCE SUPPORTED ITS DELETION. BRAZIL BELIEVED THAT THE ISSUE WAS SUBSUMED UNDER "TO PRESERVE THE RIGHTS OF THE PARTIES TO THE DISPUTE." OTHERS, SUCH AS THE UNITED STATES, CANADA, AUSTRALIA, NORWAY, AND JAPAN URGED THAT IT SHOULD BE RETAINED. A FURTHER MODE OF RESTRICTING THE POWER OF THE LIMITED OFFICIAL USE

LIMITED OFFICIAL USE

PAGE 04 USUN N 01992 01 OF 02 221712Z POSS DUPE

COURT TO PRESCRIBE, MODIFY, OR MAKE PROVISIONAL MEASURES WAS PROPOSED BY HONDURAS AND ENDORSED BY OTHERS, WHICH SUGGESTED THAT THE POWER COULD BE INVOKED ONLY IF THE "URGENCY" OF THE SITUATION SO REQUIRED. OTHER PROPOSED ADJECTIVES INCLUDED "SERIOUS" OR "IRREPARABLE" HARM. HONDURAS WAS SUPPORTED BY BRAZIL, ECUADOR AND BULGARIA.

LIMITED OFFICIAL USE

NNN

LIMITED OFFICIAL USE

PAGE 01 USUN N 01992 02 OF 02 230215Z  
ACTION DLOS-09

INFO OCT-01 IO-13 ISO-00 FEA-01 ACDA-07 AGRE-00 AID-05  
CEA-01 CEQ-01 CG-00 CIAE-00 EPG-02 COME-00  
DODE-00 DOTE-00 EB-07 EPA-01 ERDA-05 FMC-01  
TRSE-00 H-01 INR-07 INT-05 JUSE-00 L-03 NSAE-00  
NSC-05 NSF-01 OES-07 OMB-01 PA-01 PM-04 PRS-01  
SP-02 SS-15 USIA-06 AF-10 ARA-10 EA-07 EUR-12  
NEA-10 /162 W

-----050093 230237Z /64

R 221605Z JUN 77  
FM USMISSION USUN NEW YORK  
TO SECSTATE WASHDC 4147

LIMITED OFFICIAL USE SECTION 2 OF 2 USUN 1992

FROM USDEL LOS

2. ARTICLE 12(3)- THE MAJOR DEBATE ON 12(3) CENTERED ON WHETHER OR NOT THE LAW OF THE SEA TRIBUNAL (LOST) SHOULD BE THE RESIDUAL FORUM EMPOWERED TO PRESCRIBE PROVISIONAL MEASURES PENDING THE ESTABLISHMENT BY THE PARTIES OF THE TRIBUNAL. IT WAS ARGUED BY BAHRAIN, ISRAEL, KOREA, BRAZIL, FRANCE, ECUADOR, THE USSR, MEXICO, BULGARIA AND ARGENTINA, WHO WISHED ITS DELETION, AND THE U.S., SWITZERLAND AND JAPAN, WHO FAVORED ITS RETENTION, THAT ONLY A FORUM COMPETENT TO DEAL WITH THE SUBSTANCE OF THE DISPUTE IN WHICH THE PROVISIONAL MEASURE IS REQUESTED CAN BE ALLOWED TO PRESCRIBE A PROVISIONAL MEASURE. ARTICLE 9(5) PROVIDING FOR ARBITRATION AS THE RESIDUAL FORUM IN CASES OF NON-AGREEMENT WOULD NOT BE APPROPRIATE IN 12(3), AS PROVISIONAL MEASURES TO PROVE EFFECTIVE MUST BE RENDERED EXPEDITIOUSLY, AN IMPOSSIBILITY GIVEN THE TIME REQUIRED TO CONSTITUTE AN ARBITRAL TRIBUNAL. FRANCE AND THE USSR AGAIN INDICATED THEIR INABILITY TO ACCEPT THE LOST IN 12(3), ARGUING THAT IT PLACED THE LOST IN A PREFERRED POSITION VIS-A-VIS OTHER LIMITED OFFICIAL USE

LIMITED OFFICIAL USE

PAGE 02 USUN N 01992 02 OF 02 230215Z

ARTICLE 9 FORA. THE UK WAS SOMEWHAT MORE FLEXIBLE ON THIS POINT, ALTHOUGH IT ALSO PREFERRED ARBITRATION AS THE RESIDUAL FORUM. ANOTHER ISSUE RAISED BY THE UNITED KINGDOM WAS THE NEED TO SPECIFY THE POINT OF TIME FROM WHICH THE TWO WEEK PERIOD IN ART. 12(3) WOULD RUN. IT SUGGESTED THAT IT SHOULD BEGIN FROM THE DATE THE PARTY COMMUNICATED ITS INTENT TO THE OTHER PARTY TO APPLY FOR PROVISIONAL MEASURES. THE VIEW WAS ALSO EXPRESSED BY SWITZERLAND, USSR AND NORWAY THAT THE COURT SHOULD ACT EX PROPRIO MOTU IN CASES OF MODIFICATION OF REVOCATION, A PROPOSITION EQUALLY CONTESTED BY BAHRAIN, HONDURAS, TUNISIA, AND MEXICO.

3. FRANCE SUPPORTED THE VIEW THAT THE PROVISIONAL MEASURES SHOULD NOT BE OBLIGATORY, AND THAT SUBPARAGRAPHS (3)-(5) SHOULD BE DELETED IN THEIR ENTIRETY.

4. THE USSR, IN ADDITION TO MAKING THE POINT AS TO THE POSITION OF THE LAW OF THE SEA TRIBUNAL IN 12(3), INDICATED THE INEQUITY OF REQUIRING PARTIES NOT CHOOSING THE LOST UNDER ARTICLE 9 TO PAY THE COSTS OF PROVISIONAL MEASURES RENDERED BY THE LOST UNDER 12(3) AS WELL AS THOSE OF THE FORUM CHOSEN UNDER ARTICLE 9. IT STATED THAT ONLY THOSE WHO SELECT THE LOST UNDER ARTICLE 9 SHOULD BE RESPONSIBLE FOR COVERING THE COSTS THEREOF.

5. THE UNITED STATES REPLIED TO MANY OF THE CONTENTIONS PRESENTED. IN ADDRESSING WHETHER "INDICATE" OR "PRESCRIBE"

SHOULD PREVAIL IN 12(1), IT REFERRED TO THE 1928 GENEVA ACT, WHICH USED "INDICATE" IN THE FRENCH TEXT AND "LAY DOWN" IN THE ENGLISH TEXT, BUT PROVIDED THAT BOTH PARTIES WOULD BE BOUND TO COMPLY WITH ANY PROVISIONAL MEASURES RENDERED. REGARDING THE TWO TRIBUNAL ISSUES IN 12(3), IT STATED THAT THE ILC DRAFT ARTICLES ON ARBITRAL PROCEDURE LIMITED OFFICIAL USE

LIMITED OFFICIAL USE

PAGE 03 USUN N 01992 02 OF 02 230215Z

PROVIDED THAT IN CASES OF DISAGREEMENT ON JURISDICTION, THE ICJ WAS THE FORUM TO BE UTILIZED FOR PRELIMINARY DECISION, AND WAS EMPOWERED TO RENDER PROVISIONAL MEASURES TO PROTECT THE RESPECTIVE RIGHTS OF THE PARTIES, PENDING ULTIMATE RESORT TO THE ARBITRAL TRIBUNAL. THE ILC THEREFORE DID NOT FIND IT IMPOSSIBLE TO COMBINE THE ROLE OF TWO TRIBUNALS. THE U.S. FURTHER PROPOSED THAT THE TWO WEEK PERIOD IN 12(3) COMMENCE FROM THE DATE OF SUBMISSION TO THE FORUM OF THE REQUEST FOR PROVISIONAL MEASURES. IN REPLY TO A UK OBJECTION, THE U.S. SUGGESTED THE ADDITION IN 12(2), AT THE END OF THE FIRST SENTENCE, OF THE PHRASE "BUT NEED BE LIMITED TO THOSE PROPOSED BY THE PARTIES." IT ALSO SUPPORTED THE NEED FOR THE RETENTION IN 12(1) OF THE PHRASE "OR TO PREVENT SERIOUS HARM TO THE MARINE ENVIRONMENT, PENDING FINAL ADJUDICATION," AS IT WOULD BE INCONCEIVABLE THAT A CONFERENCE WITH SUCH A MANDATE AS THE PRESENT ONE COULD DELETE THE PROVISION, GIVEN THE UNIVERSAL CONCERN ABOUT THE INCREASING THREATS TO THE MARINE ENVIRONMENT.

6. IN RESPONSE TO A QUERY BY ISRAEL, THE CHAIRMAN ANNOUNCED THAT HE PLANS TO PREPARE A MEMORANDUM CONTAINING THE EXPLANATIONS OF THE DRAFT TEXT AND PROPOSED AMENDMENTS, WHICH HAVE BEEN MADE BY HIM DURING THE DEBATES IN INFORMAL PLENARY.

7. THE PRESIDENT ADJOURNED THE SESSION, STATING THAT THE INFORMAL PLENARY ON ANNEX IV WOULD NEXT MEET ON WEDNESDAY, 22 JUNE TO DISCUSS ARTICLE 18 (OPTIONAL EXCEPTIONS).  
YOUNG

LIMITED OFFICIAL USE

NNN

## Message Attributes

**Automatic Decaptioning:** X  
**Capture Date:** 01-Jan-1994 12:00:00 am  
**Channel Indicators:** n/a  
**Current Classification:** UNCLASSIFIED  
**Concepts:** LAW OF THE SEA, MEETING REPORTS  
**Control Number:** n/a  
**Copy:** SINGLE  
**Sent Date:** 22-Jun-1977 12:00:00 am  
**Decaption Date:** 01-Jan-1960 12:00:00 am  
**Decaption Note:**  
**Disposition Action:** RELEASED  
**Disposition Approved on Date:**  
**Disposition Case Number:** n/a  
**Disposition Comment:** 25 YEAR REVIEW  
**Disposition Date:** 22 May 2009  
**Disposition Event:**  
**Disposition History:** n/a  
**Disposition Reason:**  
**Disposition Remarks:**  
**Document Number:** 1977USUNN01992  
**Document Source:** CORE  
**Document Unique ID:** 00  
**Drafter:** n/a  
**Enclosure:** n/a  
**Executive Order:** N/A  
**Errors:** N/A  
**Expiration:**  
**Film Number:** D770223-0845  
**Format:** TEL  
**From:** USUN NEW YORK  
**Handling Restrictions:** n/a  
**Image Path:**  
**ISecure:** 1  
**Legacy Key:** link1977/newtext/t19770629/aaaaazfs.tel  
**Line Count:** 265  
**Litigation Code IDs:**  
**Litigation Codes:**  
**Litigation History:**  
**Locator:** TEXT ON-LINE, ON MICROFILM  
**Message ID:** 4e686078-c288-dd11-92da-001cc4696bcc  
**Office:** ACTION DLOS  
**Original Classification:** LIMITED OFFICIAL USE  
**Original Handling Restrictions:** n/a  
**Original Previous Classification:** n/a  
**Original Previous Handling Restrictions:** n/a  
**Page Count:** 5  
**Previous Channel Indicators:** n/a  
**Previous Classification:** LIMITED OFFICIAL USE  
**Previous Handling Restrictions:** n/a  
**Reference:** n/a  
**Retention:** 0  
**Review Action:** RELEASED, APPROVED  
**Review Content Flags:**  
**Review Date:** 03-Dec-2004 12:00:00 am  
**Review Event:**  
**Review Exemptions:** n/a  
**Review Media Identifier:**  
**Review Release Date:** n/a  
**Review Release Event:** n/a  
**Review Transfer Date:**  
**Review Withdrawn Fields:** n/a  
**SAS ID:** 2063019  
**Secure:** OPEN  
**Status:** NATIVE  
**Subject:** INFORMAL PLENARY OF LOS (ARTICLE 12) OF JUNE 20, 1977 SUMMARY: THE DEBATE ON ARTICLE 12 (PROVISIONAL MEASURES)  
CE  
**TAGS:** PLOS, OCON, XX, LOS  
**To:** STATE  
**Type:** TE  
**vdkgvkey:** odbc://SAS/SAS.dbo.SAS\_Docs/4e686078-c288-dd11-92da-001cc4696bcc  
**Review Markings:**  
Margaret P. Grafeld  
Declassified/Released  
US Department of State  
EO Systematic Review  
22 May 2009  
**Markings:** Margaret P. Grafeld Declassified/Released US Department of State EO Systematic Review 22 May 2009